United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7591,76-7613

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FOR THE SECOND CIRCUIT

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN AND DALIA KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY AND NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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I. Counterstatement of Facts

The circumstances of the accident itself are not material to any issue before the Court. It is sufficient to note that an aircraft sold by the defendant North American Rockwell Corporation to the plaintiff, Israel Aircraft Industries, Ltd. (hereinafter IAI) and containing a part manufactured by the defendant Standard Precision, a division of Elec-

tronic Communications[1] (hereinafter SP) crashed in Israel on January 21, 1970 and was totally destroyed. The three individual plaintiffs, Zohar Landau, Mordechai Muscatel and Hagai Koren were on board the aircraft and parachuted from it prior to the crash and were injured upon contacting the ground. All three were employees of IAI on the date of the accident. The claims of the other three plaintiffs, Nira Landau, Fila Muscatel and Dalia Koren, the wives of the crew members, were dismissed and are not involved in these appeals.

The claims of all plaintiffs were tried to a jury during the period from January 12 to February 4, 1976. The liability issues were tried first and the jury apportioned responsibility for the accident at 65% for IAI, 35% for SP and Rockwell was exonerated.[2] The same jury then heard the damage evidence and found the total amount of damage that IAI suffered to be $860,000 and found Landau's damage to be $275,000, Muscatel's to be $135,000, and Koren's to be $15,000.[3] Since liability had been established at 65% for IAI and 35% for SP, IAI stood to recover 35% of $860,000 or $301,000 from SP on its property damage claim and would have to pay $276,250 or 65% of the $425,000 awarded to the crew members. Since 35% of the fully insured value of the aircraft amounts to $280,000 (35% of $800,000), that amount of the hull recovery would go to the hull insurers, leaving some other IAI interest to pay the $276,250 due on the crew members' recovery. Whether the $21,000 ($301,000 minus $280,000) over insurers' interest

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[1] The defendants other than North American Rockwell are related Corporations and have been treated as a single entity (SP) throughout the litigation.

[2] No question was ever raised in the post-trial motions or these appeals with respect to the exoneration of North American Rockwell and it is out of the case.

[3] No party has raised any issue on appeal with respect to the magnitude of the awards or the allocation of those awards between IAI and SP.

in the hull claim would be credited to the crew recovery does not appear on the record.

On March 31, 1976, fifty-six days after the jury verdict, but before any final order or judgment had been entered, IAI made a motion for summary judgment in its favor with respect to the $276,250 it stood to pay as its 65% share of the crew members' awards, and in support of the motion submitted copies of releases signed by each of the crew members (186a-194a). Koren's release was signed by him on July 3, 1970, Landau's on January 20, 1971, and Muscatel's on March 1, 1971.

The appearance of the releases set off a wave of activity by all parties, including a motion by SP to amend its answer to plead the releases as defenses to the claims of the crew members (196a) and this motion in turn set off another wave of activity. All papers on all motions were filed by May 14, 1976 (except for a response to the Court's request for the original releases), and on October 27, 1976, the Court entered its order dismissing the claims of all plaintiffs *sua sponte* and then denied the motions of IAI and SP as moot.[1] The information upon which the Court relied in its two opinions was supplied in its entirety by plaintiffs (A23). All plaintiffs thereafter moved for reargument and those motions were considered and denied by the Court in its order of January 4, 1977 (A18), and these appeals followed. Pursuant to General Rule 9 (m) of the District Court, defendant submitted no papers in opposition to the reargument motions.

II. Counterstatement of Issues Presented for Review

The only true issue on this appeal is whether the District Court properly exercised its discretion in finding on evidence supplied solely by plaintiffs, that the litigation was

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[1] This decision prompted a scathing letter (593) 9 ~~(R-120)~~ from IAI's counsel to the District Court.

sufficiently infected by illegality, fraud and deception to warrant its dismissal.

The concealment of the releases was only one factor in the Court's reasoning. The other factors included the illegal agreement concealed by all plaintiffs prior to trial and revealed by Dr. Hermann's unsworn affidavit (373a-374a) referred to by the Court at A10,[1] n8, Muscatel's false and misleading deposition testimony (A10, n8), evasive or incorrect answers by Muscatel and Landau to questions posed prior to the commencement of the litigation[2] (A8, A9), the failure of the crew members and their counsel (both William L. Schierberl and Norman L. Cousins) to reveal that they had settled with IAI (A15) the demand by IAI on the crew members that they reduce their claim against SP which disproved the contention of IAI that their counsel did not understand the effect of the releases (A16, A17), Schierberl's false assurance to defendants that the entire personnel files would be produced and Schierberl's

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[1] References consisting of the letter A followed by a number refer to page number in the addendum to IAI's brief.

[2] The district Court erroneously referred to these as answers to defendant's interrogatories. In fact the questions were posed to the crew members at the request of Condon & Forsyth (IAI brief p. 8) and answers supplied by the crew members before the commencement of the litigation (IAI brief p. 9). The questionnaire and the answers were supplied by Condon & Forsyth to counsel for defendants. The District Court took its misunderstanding from the papers submitted by the crew members who refer to the questionnaire as "specific written questions posed by the defendants", but say they were prepared by IAI (505a). IAI on the other hand refers to the answers as having been prepared by the crew members, with the assistance of IAI's Director of Insurance and Claims (305a). This misnomer by the Court is of no moment and indeed the crew members have raised no objection to it. IAI on the other hand, claims the misnomer had "serious effects in the Opinion of the Court below" (IAI brief p. 8, n. 5). The objection is difficult to understand unless it is being suggested that anything produced by these plaintiffs that is not sworn to should be treated as being unreliable.

certification of the complaint pursuant to FRCP 11. All of the above established a clear pattern of deception by plaintiffs (A6, A7, A17).

III. Counterstatement of the Case

1. Nature of the Case (IAI Point II(1))

IAI characterizes its action as a "subrogation property damage action". (IAI Brief p. 3)[1] While this is true in the sense that the insurers had an interest in any recovery, the action was not solely a subrogation action.

The aircraft was fully insured for $800,000 (241a-242a), and the complaint sought $1,000,000 for its loss (48a). IAI's evidence was that the value of the aircraft was $1,232,636. Since the insurers' interest was only $800,000, IAI had its own interest to the extent of any amount over $800,000.

IAI is also inaccurate on this point when it states that the crew members "joined in the action" (IAI brief, p. 4). The evidence establishes that IAI's insurers suggested that they join and IAI agreed and cooperated with that suggestion (245a; 303a), and indeed agreed to finance the crew members' litigation in the District Court (373a).

2. The Course of the Proceedings (IAI Point II (2))

IAI's statement on this point is inaccurate when it states its motion of March 31, 1976 to dismiss SP's counterclaim was based on information obtained *post* verdict. (IAI brief p. 5). The "information" was available and known to IAI since the dates of execution of the releases. While the motion may have been "filed" by counsel, in the sense that

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[1] This characterization is repeated throughout the IAI brief.

he carried the papers to the Court House, the motion was made by the plaintiff, IAI, who cannot hide behind the misleading phrase "information obtained *post* verdict". *Link* v. *Wabash*, 370 U.S. 632, 634, 825, Ct. 1386, 1390 (1962). In addition to seeking to reduce the crew members' verdict by 65%, IAI's motion also suggested that the crew members had released their claims against SP and had received "full and fair compensation" from IAI (466a-469a).

While the original cross motion of SP did not seek relief against IAI, SP did subsequently suggest to the Court (after Dr. Hermann's unsworn affidavit revealed the illegal agreement between IAI and the crew members) that the proper action for the Court to take was a dismissal of the entire complaint (558a, 580a).

3. The Disposition in the Court Below (IAI Point II (3))

IAI's statement is inaccurate in that the District Court did not act solely on the fact of the concealment of the releases but on additional facts (as stated in the District Court Opinion and reviewed at pages 4-5 of this brief) and that the evidence revealed a pattern of deception and not an isolated incident.

4. Facts Relevant to the Issues Presented for Review (IAI Point II (4))

A. Pre-litigation Background

IAI's statement that the aircraft was fully insured is established by the evidence of Selvyn Seidel (242a, 245a). The further statement in its brief (p. 7) that the insurers paid "over $800,000" is not correct. Mr. Seidel testified that IAI was paid $800,000 (242a).

The statement by IAI at page 8 of its brief regarding its understanding of the effect of the releases ignores the fact that IAI also took the position in the Court below that perhaps the releases did bar claims by third parties. In its memorandum of law in support of the motion, IAI stated that the only issue before the Court was whether the crew members should be allowed to recover 35% "or whether they waived their rights to all recovery" (469a). See also IAI's argument in their Reply Memorandum on the same motion where it is stated that if the law prior to 1973 is applicable, the crew members are precluded from all relief (501a).

After the October 26, 1976 opinion, IAI also "seriously questioned" an opinion of their own legal expert, Dr. Hermann; that the releases could be interpreted as general releases (303a-304a), but do not explain why the so-called serious question was not resolved before Dr. Hermann's opinion was submitted to the Court or at least in several months between its submission and October 26th.

The statement at page 8 of the IAI brief that Condon & Forsyth also were "asked to represent the crew members" evades an interesting point. According to Mrs. Hertzela Ron, General Counsel for IAI, the suggestion that the crew members be joined came from IAI's insurers (245a-246a), and IAI cooperated with the insurers in that regard (303a). Who asked Condon & Forsyth to represent the crew members is not clear from their brief.

B. Litigation and Pre-Trial Proceedings

The statement by IAI that after January 14, 1974, Condon & Forsyth did not receive any requests for documents relating to the personal injury claims of the crew members (IAI brief, p. 11) ignores the fact that on October 2, 1974, defendants filed a motion to dismiss plaintiffs' complaint for failure to produce these documents, among others. The motion was vigorously opposed by IAI and its counsel's

affidavit states: "4. On July 5, 1973 defendants' counsel served a Notice for the Production of Documents upon the counsel for Israel Aircraft Industries Ltd. In response on January 10, 1974, and at various subsequent depositions, plaintiffs produced a substantial number of documents, which constituted all the documents in its possession which relate to the facts of this case", (118a-119a), a statement which was knowingly false when made since it is conceded by IAI that its counsel never made any inquiry with respect to these documents (IAI brief, p. 10) and could not know whether all of them had been produced. The affidavit was conclusively demonstrated to be false by the revelation of the releases and the additional 1972 agreement.

C. The Substitution of Separate Counsel for the Crew Members and Their Depositions

The substitution referred to in fact has never occurred. Rule 4(c) of the General Rules of the District Court provides as follows:

> "(c) An attorney who has appeared as attorney for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar".

At page 27 of its brief, IAI states (without supporting authority) that "Upon the replacement of Condon & Forsyth by Fuchsberg & Fuchsberg in July 1974, the responsibility for the discovery and production of documents with regard to the crew members and their claims shifted to the new counsel for the crew". This statement disregards the fact that the discovery notice was directed to all plaintiffs including IAI. It is also incorrect because Condon &

Forsyth were not replaced by Fuchsberg & Fuchsberg, but continued to act as counsel for the crew members.

In his closing argument, Mr. Schierberl addressed the jury as follows:

> ". . . I believe I have earned the right to come to you now and ask for your verdict in favor of plaintiff, Israel Aircraft Industries, Hagai Koren, Zohar Landau and Mordechai Muscatel in all respect." (357a), and

Mr. Cousins argued in favor of IAI:

> "Now, nothing IAI did, in my opinion, in any way caused this accident." (356a)

The statement by IAI that "none of them [crew members] was asked to produce any documents relating to the payments during their respective depositions" (IAI brief, p. 14) ignores the fact that defendant's Notice to Produce was directed to all plaintiffs (60a) and the Notice of Deposition of the crew members requested them to produce their records, including those called for by the Notice to Produce. Thus, the crew members were asked to produce the personnel files at their depositions (62a-63a).

There is a curious contradiction between the statements contained in the second paragraph of page 14 of IAI's brief and the testimony of the General Counsel, Mrs. Ron on the motion for reargument.

The brief states that on the basis of "the medical records, the written answers to the informal questionnaire and the deposition testimony of individual plaintiffs" (IAI brief p. 14) Condon & Forsyth assumed the payments were in the nature of workmen's compensation benefits. This ignores the facts that the answers to the questionnaire were available to Condon & Forsyth on November 28, 1972 (IAI brief, p. 9) and the crew members were deposed in July

and September of 1974 (IAI brief, p. 12, n.8). The medical records do not address themselves to any aspect of the nature of the payments by IAI to the crew members. Thus any misunderstanding by Condon & Forsyth during the period from November 28, 1972 until July 1974 had to be based solely on the answers to the questionnaire and it was during this period of time that defendant's Notice to Produce was served and Schierberl's false assurance was given to defendants. Thus, if it was Schierberl's "misunderstanding" that led him to ignore the Notice, it was the questionnaire and the answers thereto that were responsible. These were prepared by his clients in contemplation of this litigation and the questionnaire was forwarded to IAI at the request of Condon & Forsyth. Thus, they were very close to the source of the misunderstanding, if misunderstanding it was.

In addressing herself to this proposition with respect to defendants being misled by the answers to the questionnaire, Mrs. H. Ron, General Counsel for IAI, has testified that she cannot understand how the answers could mislead anyone into thinking the payments were in the nature of Workmen's Compensation" (306a).

This leaves IAI in the peculiar position of contending that they cannot see how defendants were misled and simultaneously contending that their own counsel was misled by the same information.

D. Defendant's Pre-Trial Discovery Motions

In opposition to defendant's motion of October 2, 1974, IAI submitted the affidavit of Marshal L. Turner, Esq., of Condon & Forsyth who stated flatly:

> "4. On July 5, 1973 defendants' counsel served a Notice for the Production of Documents upon the counsel for ISRAEL AIRCRAFT INDUSTRIES, LTD. In response, on January 10, 1974, and at various subsequent

> depositions, plaintiffs produced a substantial number of documents, which constituted all the documents in its possession which relate to the facts of this case." (118a-119a)

Apparently, the District Court believed Mr. Turner and the motion was denied on November 19, 1974 (139a).

IAI now says that Condon & Forsyth had not even asked it for the personnel files and of course the releases (and probably the 1972 agreement) were contained therein (306a-307a). Mr. Turner's statement was false and his client had not produced all documents. Mr. Turner also stated that:

> "3. Upon information and belief the personal counsel for plaintiffs Landau, Muscatel and Koren have transmitted or are in the process of transmitting all personnel records to defendants' counsel." (119a)

However, the record and IAI's brief are silent on the source of his information and belief, and Mr. Cousins has denied that he had any knowledge of the releases until during the trial (258a-259a).

The final paragraph of IAI's discussion of this point (IAI brief p. 16) seems to imply that after having had its Rule 37 motion denied by the Court (on the basis of false affidavits submitted by IAI), there was a continuing obligation on defendants to continue to request that plaintiffs fulfill their obligations under the rules. After having characterized the Rule 37 motion as harassment by defendant (124a), and having induced the Court to act on its false statements, it ill behooves IAI to contend that defendants had some further obligation.

E. The Post Trial Motions and Discovery of the Releases

The sequence of events claimed to have led to the revelation of the releases is still not clear in the record. The

crew members claim that sometime during the damage trial, Mr. Otzman (sic) in the Flight Test Personnel Department at Israel Aircraft told Landau or Koren that the crew members *may* have signed some kind of release (258a-259a). This assertion is denied by IAI who state that their Mr. Atzmon, Director of Insurance and Claims denies any such conversation with either Landau or Koren and in any event, he had returned to Israel two weeks before the alleged time of the conversation (304a, footnote**).

Equally unclear is who attended Mr. Schierberl's conference in Israel on March 15, 16, and 17, 1976, "with IAI and Israeli counsel concerning the history and legal significance of the release" (IAI brief, p. 17) (Schierberl affidavit submitted in support of IAI's motion for reargument (228a). Mrs. Ron claimed in her affidavit of November 17, 1976 that:

> "Hence, prior to this Court's decision, IAI was unaware of the request to produce the personnel records. In fact, IAI was never asked—not by Fuchsberg & Fuchsberg, not by Mendes & Mount not by Condon & Forsyth and not by anyone else—whether any agreements at all were entered into between IAI and the individual plaintiffs pertaining to the payments made by IAI to the crew." (305a)

Obviously, if one of these sworn statements is true, the other is untrue, unless it is suggested to the Court that Mr. Schierberl conferred with his client for 3 days about the history and legal significance of the release and never asked about the agreement and the payments to the crew members.

If Mrs. Ron's sworn testimony is correct, then Mr. Schierberl's affidavit and the IAI brief are incorrect and vice versa.

If, as Mrs. Ron says, IAI did not supply the information used by its attorneys in the papers submitted on summary

judgment motion, where did that information come from? The only other possible source is the crew members themselves and Condon & Forsyth claim not to have represented them since July 1974. It is, therefore, fair to conclude that if Mrs. Ron's affidavit is correct, the crew members told Condon & Forsyth about the releases some time prior to July 1974.

IV. ARGUMENT

The District Court was fully justified in dismissing the claims of all plaintiffs on the basis of information supplied solely by plaintiffs.

1. The Action Was Brought Pursuant to an Agreement Which Was and Is Illegal Under the Statutes of the State of New York and Under the Common Law.

The unsworn affidavit of Dr. Hermann (referred to throughout this brief as the Hermann affidavit as it was so called by the District Court (A8, n8)), submitted by IAI in support of their motion for summary judgment states that:

> "(1) At this stage it is worthwhile to mention that, IAI alleges that in 1972, i.e. about two years after the LMK[1] Deeds of Release, another agreement (hereinafter 'THE ADDITIONAL AGREEMENT') was entered into between IAI and LMK, whereby without affecting the other provisions of the LMK Deeds of Release:
>
> (aa) IAI, being the employer of LMK, undertook to advance and/or cause the advance of the expenses, except lawyers fees, connected with the LMK lawsuits, in order to enable LMK to file same against SP; and—
>
> (bb) LMK, on their part, in case of the success of the LMK lawsuits, undertook to repay IAI both

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[1] LMK was Dr. Hermann's shorthand designation for the three crew members, Landau, Muscatel and Koren.

the expenses to be incurred by IAI as aforesaid, and, in addition thereto, also the amounts paid to each of them under the Deeds of Release. In case of failure of the LMK lawsuits, no obligation of such refund lie with LMK;

(2) As a matter of fact, the above expenses have actually been advanced and paid by IAI or caused by IAI to be so advanced and paid;

(3) IAI alleges that the additional agreement which was drafted in writing is unavailable due to misfiling. Landau denies the existence of the additional agreement. Muskatel admittedly acknowledged the existence thereof. Koren's reaction is not clear;

(4) (aa) I should like to point out that except as mentioned in Art. 13 below, this my opinion is unaffected by the existence or non-existence of the additional agreement;

(bb) The uncontested fact of the expenses being advanced by IAI as aforesaid, is in some instances taken into consideration as one of the factual elements supporting legal conclusions, but even in those points, where I took into consideration this fact, the conclusions would be unaltered, even if IAI would not have advanced to LMK expenses as aforesaid." (373a-374a)

Although Dr. Hermann's unsworn affidavit states that Landau denied the existence of the 1972 agreement, Muscatel admitted its existence, and Koren's reaction was not clear, the crew members have admitted that they had an agreement to pay IAI a portion of their anticipated recovery from defendants (Crew members' brief, pp. 10, 14). See also affidavit of Mr. Cousins sworn to on November 5, 1976, which states: ". . . they [crew members] understood the money would have to be repaid; . . ." (253a), the testimony of Muscatel (353a-354a); and

the response of Landau and Muscatel to question 13 of the Condon & Forsyth questionnaire (329a-332a).

The agreement which provides for the payment to IAI of a portion of the crew members' anticipated recovery in return for IAI's financing of the lawsuit is the Additional Agreement referred to by Dr. Hermann and no plaintiff has contended otherwise. IAI's supplemental memorandum of law in support of its motion establishes that IAI itself, rather than some other IAI interest, financed the crew members' litigation (585a). Mrs. Ron's affidavit establishes that the IAI interests suggested that the crew members join in IAI's case and so there was solicitation and assignment and/or the taking of an interest in the crew members' cases (245a-246a; 303a).

A. The Agreement by Israel Aircraft Industries, Ltd. to Finance the Crew Members' Litigation Against Defendants Is Illegal Under New York Judiciary Law, Section 489.

Sections 488 and 489 of the Judiciary Law read as follows:

> "Section 488. Buying Demands on Which to Bring an Action.
>
> An attorney or counsel shall not:
>
> 1. Directly or indirectly, buy, take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon."
>
> * * *
>
> Section 489. Purchase of Claims by Corporations or Collection Agencies.
>
> ". . . no corporation or association, directly or indirectly, itself or by or through its officer, agents or

employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; . . ."

Sections 488 and 489 of the Judiciary Law (McKinney's Consolidated Laws, c. 29) set forth the public policy of this state against champertous transactions. At common law, champerty consisted of "an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part in, consideration of receiving, in the event of success, part of the proceeds of the litigation", 14 C.J.S. 356 (Champerty and Maintenance). The two sections "contain substantially the phraseology and were grouped together in the same enactment and are to be considered *in pari materia.*" *People* v. *Berlin,* 317 N.Y.S. 2d 191, 195 (Nassau Cty. Ct., 1971). Reference may be made to another statute which is *in pari materia* to the one in question to aid in determining the legislative intent and purpose. (McKinney's Consolidated Laws, Book 1, Statutes, Sec. 221 et seq.). The cases interpreting Section 488 are applicable to Section 489.

Viewed in this context it can be seen that Section 488 prohibits certain activity by an attorney and Section 489 prohibits the same activity by corporations. The essential purpose of the two sections is the same—to protect a public interest in the conduct of attorneys on the one hand and the conduct of corporations on the other.

In ~~Spring~~ Spring v. *Jaffe,* 3 N.Y. 2d 539, 169 NYS 2d 456 (1951), an attorney took an assignment of a debt and brought an action against the debtor to collect it and the debtor raised Section 274 (1) of the Penal Law as a defense (Present Sections 488 and 489 of the Judiciary Law are reenactments of former Sections 274 and 275 of the Penal Law).

After quoting what now is Section 488 (1), the Court of Appeals observed:

> "This statute has long been on our books. Its purpose is to prevent an attorney from encouraging, instigating or promoting ill will and strife and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon." 3 N.Y. 2d at 543, 169 N.Y.S. 2d at 460.

Section 489 prohibits the same behavior by a corporation. In this case it is clear that the IAI interests, in order to enable the crew members to file a lawsuit against defendants, agreed to finance it. IAI took a contingent interest in their action to the extent of 90,000 Israeli pounds (373a-374a). This arrangement is squarely within the prohibition of Section 489 and accordingly, the suit as ultimately filed was illegal and void and cannot be enforced in this State.

In *Gonzalez y Barredo* v. *Schenck,* 287 F. Supp. 505, 526 (U.S.D.C., SDNY 1968), the Court observed that:

> "Section 275 of the New York Penal Code [Now § 488 of the Judiciary Law] invalidates champertous attorney fee agreements. That Section, which is a Penal Statute, is declaratory of the public policy of New York as to such agreements. An attorney fee agreement under which an attorney agrees to pay the expenses of the litigation is clearly inconsistent with and contrary to the public policy of New York. The Court is of the view that the New York Court of Appeals, when presented with the question, would hold that such an agreement would not be enforced by the New York Courts even though, as in the present case the agreement was valid between the parties under the law of the jurisdiction which was the center of gravity of the agreement."

In *American Optical Co.* v. *Curtis,* 56 FRD 26 (1971), plaintiff took an assignment of all rights owned by the University of Michigan in certain patents granted to the defendants who were employees of the University. According to the University's bylaws, all patents issued in connection with University research projects belonged to the University (who had not authorized or consented to defendant's patent applications). Plaintiff and the University entered into an agreement whereby plaintiff took an assignment of the University's rights in the patents for the purpose of bringing a suit against defendants to compel assignment to plaintiff, as successor in interest of the University, of all of defendants' rights in the patents. Defendants moved for summary judgment on the ground that the assignment by the University to plaintiff violated § 275 of the New York Penal Law (which was recodified in 1967 as § 489 of the Judiciary Law).

Since plaintiff was a Massachusetts corporation and the agreement was executed in Michigan there was raised a question of what substantive law should govern. Without passing on the legality of the agreement under Michigan law, the Court observed that that was of no moment since it was contrary to the public policy of New York and would not be enforced by a New York Court nor by a United States District Court in a diversity case.

The agreement provided in so many words that the assignment was for the purpose of bringing an action and Judge Ryan held this to be the very conduct prohibited by the New York Statute and even if legal in Michigan would not be enforced here.

B. The 1972 Agreement by Israel Aircraft to Finance the Crew Members' Litigation Against Defendants Is Illegal Under the Common Law.

Champerty and maintenance were crimes at common law and survive as such in New York only as set forth in Sections 488 and 489 of the Judiciary law. In Point A of this

section, defendants have set out their argument that the 1972 agreement violated that statute. However, quite apart from any question of the violation of the statute, the agreement is illegal (but not punishable as a crime) under the common law of this State—no matter what the status of the parties to it happens to be. That was the square holding in *Lyon* v. *Hussey*, 31 N.Y.S. 281, 82 Hun 15 (First Dept. 1894), on an agreement remarkably similar to the one in this case.

In a prior suit, Hussey had sued a third party and recovered a sum of money. Lyon had suggested to Hussey that he commence the action and since Hussey did not have enough money to finance the suit, Lyon agreed to pay the disbursements, assisted in employing counsel and in obtaining evidence to establish the claim against the third party. In return Lyon was to receive 10% of the recovery. The instant case was brought to recover from Hussey the 10% share due Lyon pursuant to the agreement.

Then, as now, champerty and maintenance existed in New York only by statute. (Currently Secs. 488 and 489 of the Judiciary Law; then Secs. 73 and 74 of the Code of Civil Procedure). Sections 73 and 74 of the Code were the counterparts of Sec. 488 of the current Judiciary law and applied only to attorneys, which Lyon was apparently not, so that the statutory prohibition did not apply to him.

However, the trial court observed as follows:

> "Having in mind the fact that it is void at common law, I do not see upon what ground its legality can be pleaded, unless some express sanction or authority can be found in some statute or decision which would give it support. Such agreements directly tend to promote litigation, to disturb the peace of individuals, and are directed to subverting the settled policy of this state.
>
> * * *

> Such an agreement is repugnant to every instinct of propriety and justice, and the portion of it which provides for pay as a consideration for procuring evidence should be regarded as immoral, illegal, and void.
>
> * * *
>
> Here was a layman, who, as stated, was a stranger to the transaction, and who forced himself upon the attention of the defendant with a statement of his ability, in consideration of a percentage of the recovery, to employ counsel, instigate the litigation, pay the necessary disbursements, and procure the evidence; thus introducing every vicious element."

On appeal, the First Department adopted the trial court opinion. The *Lyon* case has been often cited with approval in New York and other jurisdictions and is the leading case on illegal contracts which will not be enforced by any Court.

C. The Courts Will Not Assist A Party to an Illegal Contract.

In *Stone* v. *Freeman,* 298 N.Y. 268, 82 N.E. 2d 571 (1948), the New York Court of Appeals declared that:

> "It is the settled law of this State (and probably of every other state) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object . . ." Citing cases.

This language was quoted with approval by the same court in *Carr* v. *Hoy,* 2 N.Y. 2d 185, 158 N.Y.S. 2d 572 (1957). In the *Carr* case, plaintiff had contracted with others that in return for a fee of $10.00 each, plaintiff would supply female models to be photographed some in the nude, by the persons paying the fee. Hoy was the county sheriff and raided the premises and took and kept the money plaintiff had collected.

When the Sheriff refused to return the money, plaintiff brought this action for conversion of the funds. The County Court of Westchester County dismissed the complaint and the Appellate Division, Second Department unanimously affirmed. The Court of Appeals rejected plaintiff's argument that a due process violation was involved and said that:

> "No one shall be permitted to profit by his own fraud or to take advantage of his own wrong, or to found any claim upon his own iniquity or to acquire property by his own crime."

Thus, the sheriff, a stranger to the contract, was allowed to assert its illegality, the court observing that what was really involved was a disability as to the plaintiff when he asks a Court to assist him in protecting the rewards of his illegal acts.

D. Conclusion.

Pursuant to the 1972 agreement,

(1) the crew members were invited to join IAI in the New York litigation,

(2) IAI agreed to finance the crew members' litigation, except attorneys' fees, in order to enable the crew members' suit to be brought, and

(3) in return for the financing of the crew members' lawsuit, IAI was to receive 90,000 Israeli pounds and a refund of the expenses in the event of a recovery by the crew members.

Such an agreement is in violation of Section 489 of the Judiciary Law and is also illegal under the Common Law. Its enforcement against defendants would be contrary to a clearly announced public policy against such agreements.

2. The District Court Was Fully Justified in Dismissing the Claims of All Plaintiffs on the Grounds of Fraud, Deception and Misconduct on the Basis of Information Supplied Solely by Plaintiffs.

A. The Releases Were Concealed by Both IAI and the Crew Members.

At least a year after the execution of the third release, the crew members and IAI entered into the agreement referred to in Point IV(1) of this brief and the litigation contemplated by that agreement was begun in the District Court on December 21, 1972. The Koren claim was added by amendment on April 19, 1973.

On July 5, 1973, defendants served a notice for production of documents on Condon & Forsyth for all plaintiffs (58a). The written response to the notice called for by FRCP 34 was never served. Among other items, the notice called for the production of the personnel files of the three crew members.

On January 10, 1974, counsel for defendants inquired of counsel for the plaintiffs if those files were available and was advised by counsel for plaintiffs that he was obtaining those records and that they would be handed over as soon as he had them (A6, pp. 6-7). In fact, he had at that time never even made a request that his clients forward the files (IAI brief, p. 10). See also affidavit of Mrs. H. Ron, General Counsel of IAI (304a-305a).

The depositions of Landau, Muscatel and Koren were taken on July 22, July 24, and September 5, 1974, respectively. The notice of deposition (61a) requested that they bring with them the personnel files referred to in the July 5, 1973 Notice to Produce. They appeared with certain items from the files, such as medical records, but the full file was not produced.

On October 2, 1974, defendants moved to dismiss plaintiffs' complaint for failure to produce various items which

had been called for in the notice, including the personnel files (101a). This motion was vigorously opposed by IAI who submitted the affidavits of William L. Schierberl and Marshall L. Turner and a Memorandum of Law in Opposition. Turner's affidavit read in part as follows (118a-119a):

> "4. On July 5, 1973 defendant's counsel served a Notice for the Production of Documents upon the counsel for ISRAEL AIRCRAFT INDUSTRIES, LTD. In response, on January 10, 1974, and at various subsequent depositions, plaintiffs produced a substantial number of documents, which constituted all the documents in its possession which relate to the fact of this case."

Schierberl's affidavit read in part as follows (134a):

> "7. In summary, there is no validity to any of the claims by defendants of failure on the part of the plaintiffs to fully disclose. As refuted in detail in the two Affidavits before the Court in Opposition to plaintiffs' (sic) pending motions, every item demanded has either been produced, is not within the care, custody or control of the plaintiffs is in the process of being produced, or does not exist. . . ."

The Memorandum of Law read in part as follows (439a):

> "Most, if not all, of the documents referred to in the affidavit of Mr. Murphy have already been produced. The remaining documents do not exist or are not in the possession of plaintiffs."

The motion was denied by the District Court on November 19, 1974.

Trial was thereafter held and the jury returned its verdict on February 4, 1976. Shortly after the jury verdict, IAI demanded that the crew members reduce their claims

against SP by 65%, demanded that they refrain from collecting from SP any amount in excess of 35% of the verdicts and to release SP from 65% of the verdict. The crew members refused to do so (375a, Sec. 7).

On March 31, 1976, IAI filed a motion to dismiss the counterclaim of SP against it (195a), based on the releases which were produced for the first time in support of the motion. The motion papers gave no hint why they had not been produced earlier.

In its subsequent reply papers, IAI responded to that question (which had been raised by the crew members and defendants) and advised the Court that "The only reason the Releases were not raised earlier was that United States counsel for Israel Aircraft Industries, Ltd. and, apparently counsel for the crew members as defense counsel, were unaware of the fundamental difference between the law of Israel and the law of New York, which permits direct actions by employees against their employers" (497a, 498a).

IAI advised that this fundamental difference between the law of Israel and the law of the United States did not become relevant until the trial had been concluded (495a) and that "consequently the legal effect of the General Releases was not considered until after the trial" (496a). No clue was offered by IAI as to why the end of the trial was such a crucial time, but it is obvious that it was then that IAI realized it had an exposure of $276,250.00 (65% of $425,000 awarded to the crew members).

On October 26, 1976, the District Court dismissed all claims. On November 8, 1976, IAI moved for reargument and submitted the affidavit of William L. Schierberl in support of the motion. This affidavit contended for the first time that Schierberl learned of the "possible existence of these releases after the trial on liability had ended" (227a), on or about January 31, 1976. It is notable

that while Schierberl denied any prior knowledge on his part, he did not state that no one in his firm lacked that knowledge and in particular, no such affidavits were filed by any of the other Condon & Forsyth lawyers involved with the file, including Mr. Turner.

In its Memorandum of Law in support of its reargument application, IAI contended that:

> "More critically, however, the Court finds that the failure to produce the personnel files was a failure to produce the releases. However, there is no basis in the record for finding or assuming that the releases were contained in the per onnel records. By the time of the hearing, IAI will be able to show exactly where the releases were kept." (604a)

As it developed, IAI was able to show exactly where the releases were kept without a hearing! In an affidavit sworn to on November 17, 1976, the General Counsel of IAI testified that the releases were in the personnel files and had always been there (306a-307a). She also stated that IAI had never been asked for the personnel files by its attorneys, Condon & Forsyth.

This history of the behavior of IAI and/or its New York attorneys shows clearly that the releases were concealed by design and that the position taken at any given time varied with what was deemed necessary to be said at that time. Prior to trial, there were four occasions when the personnel files should have been produced; the first time was thirty days after the Notice, the second on January 10, 1974, the third at the depositions of the crew members and the fourth at the time of defendants' motion pursuant to Rule 37. IAI's response on the record on the second and fourth occasions were false and on the third was evasive. No response was ever made to the first request. On the second occasion on January 10, 1974, counsel for plaintiffs assured counsel for the defendants that the files were being

obtained and would be produced. If his client is correct, at the time that assurance was given, Schierberl had not even asked his client for the files so the statement was false. He was not obtaining the files and this is conceded in IAI's brief (IAI brief, p. 10). The brief further states that:

> "Consequently, prior to commencement of the depositions of the crew member plaintiffs on July 22, 1974, Condon & Forsyth provided Fuchsberg & Fuchsberg with copies of all documents in its files concerning the crew, including copies and translations of medical records and their answers to the pre-litigation informal questionnaire [R.97, p. 2]. These documents also were given to counsel for defendants prior to the start of the depositions of the crew members." (IAI brief, p. 12).

Thus, if these statements by IAI and its counsel are correct, at some time between January 10, 1974, and July 22, 1974, Condon & Forsyth came into possession of a portion of the items called for by Item 11 of defendants' notice to produce (58a). Of necessity, this means that someone went into the personnel files during that time and took out the medical records and withheld the other items. This was at a time when defendant's notice was outstanding and called for production of the entire file. It is clear that some request was made by Condon & Forsyth to IAI, even though IAI says that none was made. If Condon & Forsyth asked IAI for less than required by the notice, the Court may legitimately ask why they did not submit the full request. It can only be that they knew what was in the file and did not want it produced. On the other hand, if Condon & Forsyth transmitted the full request, then someone at IAI decided to withhold the full file and produce only the medical records. Note that IAI has specifically denied any such request during this period of time. Indeed they have denied any such request at any time prior to October 26, 1976 (304a-305a).

On the fourth occasion, IAI stated (and its counsel swore to the truth of the statement) that it had produced all of the documents it had. Again, according to IAI, their counsel had not even asked for the personnel files at the time these false affidavits were made. The District Court obviously relied on those affidavits because it denied defendants' motion.

The record with respect to these releases is a disgraceful one and shows a clear pattern of deception as the District Court found.

The reason given for the failure to produce them was different before October 26 and after October 26. Prior to the October 26 opinion, IAI said the releases had not been revealed because their counsel misunderstood the law while after October 26, their counsel said he didn't know of the releases. His clients' rejoinder was that he did not ask.

The determination of whether the concealment is attributable to IAI or its counsel or both is not the task of this Court or defendants. The record clearly establishes, based on IAI's own submissions, that false statements were made to the Court and to defendants' counsel and indeed the contradictions continue into IAI's brief itself. The Court was led to deny a Rule 37 motion on the basis of false affidavits and IAI now cites this fraudulently induced denial as a reason why this Court should act in its favor.

The conduct of the crew members with respect to the releases is no less reprehensible. We first observe that Condon & Forsyth are to this day the attorneys of record for the crew members in the District Court and the crew members as well as IAI are bound by their acts both before and after July 16, 1974, the date of the supposed substitution of attorneys. The false statements of ~~the~~ Condon & Forsyth are the statements of the crew members as well as those of IAI.

In addition, the crew members themselves had an obligation to reveal the releases as is more fully set forth in defendants' answer to the crew members' first point on this appeal (Defendant's brief, p. 45). Their attempt to make a double recovery of at least a portion of the damages is not only outrageous as found by the District Court, but contrary to the law of this State, *Derby* v. *Prewitt,* 12 N.Y. 2d 100, 236 N.Y.S. 2d 953 (1962).

Although the defendants' notice to produce was directed to all plaintiffs, the crew members made no response to it as required by FRCP 34, their counsel falsely assured defendants that the personnel files were being obtained, and they did not produce the releases at their depositions.

Their trial counsel, Mr. Cousins, by his own statement was aware of the possibility of the existence of the releases at the time of the trial on damages (258a-259a), but did not pursue the matter with his clients, who had copies of the releases and supplied them to Cousins after their existence was revealed on the record by IAI (522a).

Prior to trial, neither the crew members nor IAI ever disclosed the existence of the additional agreement entered into with IAI in 1972 (373a-374a) pursuant to which the crew members' New York litigation was financed in return for a portion of the hoped for recovery. In this connection, it may be noted that the crew members have insisted (in the face of the 1972 agreement) that the agreement to repay was a condition of the payments for which the releases were exchanged (Crew members' brief, p. 14). The releases were executed in 1970 and 1971 and it was not until some time in 1972 that the additional agreement was made, which provided for the repayment in event the crew members succeeded. Dr. Hermann's unsworn affidavit establishes that the 1972 agreement was separate from the releases, and it is the only agreement in the record which

deals with repayment. Thus the statement at page 14 of the crew members' brief is false and has the obvious purpose of trying to lead the Court away from consideration of the 1972 agreement.

B. Both IAI and the Crew Members Concealed the Existence of the Additional Agreement Entered Into 1972.

The illegality of the 1972 agreement is discussed at length in Point IV(1) of this brief. However, the fact that it was not revealed to the Court and defendants is another indication of fraud on the part of plaintiffs. IAI did not reveal that it had a contingent interest in the crew members' claim (based upon the prior settlements) but instead appeared before the Court and jury as a claimant in the hull suit only. The crew members did not reveal that they had sold a portion of their claim to IAI in return for the funding provided by IAI.

A litigant has an obligation to appear before the Court in his true position and to misrepresent that position is a fraud.

C. The Answers Provided by IAI and the Crew Members to the Questionnaire Were Misleading.

On September 13, 1972, Condon & Forsyth submitted questions to IAI to be answered by the crew members (IAI brief, p. 8). The crew members on the other hand state that the responses were made by IAI (505a). Once again, neither this Court nor defendants have an obligation to sort out this type of disagreement.

The answers were false and were calculated to and did mislead defendants into thinking that the payments were in the nature of Workmen's Compensation (note that Schierberl of Condon & Forsyth, counsel for IAI and the crew members says that he was similarly misled). The fact is that the agreement to repay IAI was separate from

the agreement by IAI to make the payments and in fact were separated in time by at least a year.

The characterization of the payments as *ex gratia* is contradicted by the releases themselves which show that IAI received full consideration for the payments. Indeed in its papers submitted to the District Court, IAI described the transactions as negotiated settlements (494a, 495a) and as settlement payments in consideration for releases (497a).

D. The False Representations of Schierberl on Discovery and Inspection and the False Affidavits of Schierberl and Turner in Opposition to Defendant's Rule 37 Motion Were Sufficient to Warrant Dismissal of All Claims.

On January 10, 1974, William L. Schierberl on behalf of all plaintiffs advised counsel for defendants that the personnel files would be produced.

In opposition to defendant's Rule 37 motion, both Schierberl and Turner submitted affidavits that IAI had produced all documents in its possession (this brief, p. 23).

The IAI brief concedes (IAI brief, p. 10), as it must in view of the testimony of Mrs. Ron (304a-305a) that no request for the files was ever transmitted by Condon & Forsyth to IAI. The assurance of Schierberl and the affidavits of Schierberl and Turner are thus proven false, not by any evidence produced by defendants, but by IAI's own testimony.

This is clear and convincing evidence and the District Court was fully warranted in finding that a fraud had been committed.

E. The Failure of the Crew Members and Their Counsel to Reveal the Releases Is Sufficient to Warrant a Dismissal.

Although the District Court did not believe it to be true (A26, n8), Cousins has stated that he first learned about the

possibility of the evidence of the releases during the trial and questioned Schierberl (rather than his own client) about it (258a-259a). Cousins either knew of the releases or had sufficient information that he should have pursued the matter with his client with a view to advising the Court and opposing counsel that at least a portion of his client's damages had been paid. No such information was forthcoming from the crew members or their counsel and eventually the releases were produced by IAI in an attempt to defeat the crew members' claims in whole or in part.

This concealment after the trial, even if one adopts the crew members' flimsy contention, is sufficient to warrant the action taken by the District Court.

V. Response to IAI Argument, Point I and Crew Members' Argument, Point III

Federal Rule of Civil Procedure 60(b) empowers federal courts to relieve a party from a final judgment, order, or proceeding for various reasons including under FRCP 60(b)(3): Fraud . . . misrepresentation, or other misconduct of an adverse party.

The District Court has the power *sua sponte* to set aside a judgment obtained as a result of fraud on the court. *Martina Theater Corp.* v. *Schine Chain Theatres, Inc.,* 278 F.2d 798 (1960) *Hazel-Atlas Glass Co.* v. *Hartford Empire* Co. (1944), 322 U.S. 238, 64 S.CT. 997, 88 L.Ed. 1250; *Kupferman* v. *Consolidated Research & Mfg. Corp.,* 459 F.2d 1072 (2d Cir. 1972). *Universal Oil Products Co.* v. *Root Ref. Co.,* 328 U.S. 575, 580, 66 S.Ct. 1176, 1179 (1946). The Supreme Court in *Hazel-Atlas* stated:

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and

> safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

If it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co., supra.*

This Circuit has held that fraud upon the court is "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kupferman* v. *Consolidated Research Manufacturing Corp.*, 459 F.2d 1072 (2d Cir. 1972) quoting, 7 Moore, Federal Practice, para. 60.33 at p. 515 (1971 edition) (footnote omitted). *Martina Theatre Corp.* v. *Schine Chain Theatres, supra.*

The record shows that IAI, through its attorneys Condon & Forsyth, did everything in its power to prevent the defendants from learning of the releases and ultimately the second agreement which revealed IAI's financing of the crew members' lawsuits. The numerous false assurances by attorneys for IAI to the District Court and to the defendants were a manifestation of an unconscionable plan to withhold material evidence from the defendants and from the District Court. This intentional and egregious misconduct by IAI clearly affected the decision-making process of the lower Court. See *United States* v. *International Telephone and Telegraph Corp.*, 349 F.Supp. 22; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238; *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972).

IAI had ample opportunity following the defendants' motion for summary judgment (in which defendants and the crew members characterized IAI's conduct as fraudulent) to present a full and complete explanation as to why these false statements had been made. IAI now complains that a proper hearing was a prerequisite to the District Court's determination of fraud on the Court (but does not ask this Court to order that one be held).

Clearly the Appellants in this case have not demonstrated the abuse of discretion required to reverse the District Court's decision to dismiss the complaints *sua sponte* pursuant to Rule 60 and Rule 37.

This Court in *Nederlandsche Handel-Maatschappij N. V.* v. *Jay Emm, Inc.,* 301 F.2d 114, (2d Cir. 1962), stated:

> "Moreover, since relief under Rule 60(b) is essentially discretionary, we would be loath to substitute our judgment for that of the trial judge." Citing *Atchison, T. & S. F. Ry.* v. *Barrett,* 246 F.2d 846 (9th Civ. 1957).

This Court in the case of *Westerly Electronics Corp.* v. *Walter Kidde & Co., Inc.,* 367 F.2 269 (2d Cir. 1966) held:

> "Clearly, appellant has not demonstrated the abuse of discretion required to reverse the trial judge's decision on a Rule 60(b) motion." Citing *Nederlansche Handel-Maatschappij, N.V.* v. *Jay Emm, Inc.,* supra.

The question of whether or not a District Court had abused its discretion in dismissing an action was considered by the United States Supreme Court in *National Hockey League, et al.* v. *Metropolitan Hockey Club, Inc., et al.,* 96 S.Ct. 2778 (1976). In granting the petition and reversing the Court of Appeals, the Supreme Court at page 2780 held:

> "While the Court of Appeals stated that the District Court was required to consider the full record in determining whether to dismiss for failure to comply

> with discovery order, see *Link* v. *Wabash Railway Co.*, 370 U.S. 626, 633-634, 82 S.Ct. 1386, 1390, 8 L.Ed. 2d 734 (1962), we think that the comprehensive memorandum of the District Court supporting its order of dismissal indicates that the Court did just that. That record shows that the District Court was extremely patient in its efforts to allow the respondents ample time to comply with its discovery orders. Not only did respondents fail to file their responses on time, but the responses which they ultimately did file were found by the District Court to be grossly inadequate."
>
> * * *
>
> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."

The essential facts which formed the basis of the District Court's opinions of October 26, 1976 and January 4, 1977, were provided by the plaintiffs themselves.

Had Judge Carter granted a hearing to IAI and the individual plaintiffs, what new exculpatory evidence could they have presented at a hearing that they were not able to submit in response to the original allegations of fraud in defendant's motion for summary judgment filed on April 21, 1976? In support of their motions for reargument and reconsideration submitted after the District Court's October 26, 1976 opinion, plaintiffs had the opportunity to present unlimited affidavits and any other exonerating documents.

The facts of *Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974), are easily distinguishable from the instant case. In *Flaks*, the sanctions were severe in view of the absence of evidence of willfullness on the part of defendants in failing to answer a small number of interrogatories and failing to appear at a deposition. The District Court's

order was based solely on the affidavits of the plaintiff's attorneys who moved for dismissal.

IAI's brief cites *Kupferman v. Consolidated Research and Manufacturing Corp.*, 459 F.2d 1072, decided by this Court in 1972, to support its position that IAI's and its attorneys' failure to produce the releases was simply the result of "acting on incorrect assumptions similar to the incorrect assumptions involved in Kupferman." (IAI brief page 26).

In Kupferman the key question was whether Ross' (attorney for appellee) failure to apprise the Court of a release before the trial ended was such a breach of duty as to constitute a fraud on the Court. This Court determined that Ross had a right to reasonably assume that defendant's lawyer, Purcell, was aware of the release for the obvious reason that defendant, Consolidated, was a party to the release and Purcell had complete access to Consolidated's records. This Court determined that where it was reasonable to assume that Purcell had knowledge of the release it was also reasonable to assume that Purcell had made a tactical decision to defend on another ground. Further, Ross could also have reasonably assumed that Purcell had perceived, as did Ross, that the legal effect of the release was questionable.

The Court also found that Ross made no misrepresentations and did not violate the Code of Professional Responsibility by concealing or knowingly failing to disclose that which he was required by law to reveal.

The case before this Court and Kupferman can easily be distinguished.

a. Standard Precision was not a party to the releases executed by Landau, Muscatel and Koren in favor of IAI in exchange for payment by IAI of 90,000 Israeli pounds. IAI and the individual plaintiffs and/or their attorneys were under a duty to disclose these payments and releases

to obviate an illegal double recovery and to permit counsel for defendants to cross-examine IAI representatives and the individual plaintiffs at trial to ascertain the basis for the claims against IAI. Additionally, plaintiffs were required pursuant to FRCP Rules 12 and 8(c) to plead the releases as an affirmative defense to defendant's counterclaim.

b. Whereas in *Kupferman* this Court found that Ross made no misrepresentations, in the instant case the District Court in its opinion of October 26, 1976 determined numerous misrepresentations and deceptions on the part of IAI, the individual plaintiffs and their attorneys. Appellee Standard Precision in this brief has also called attention to the repeated misrepresentations by plantiffs and their attorneys to the District Court and to the defendant in an attempt to conceal the releases.

c. In *Kupferman* this Court found that Ross was not under any order to produce all relevant documents including the release. In the case at bar, Defendants moved the District Court for an order dismissing the complaints for failure of plaintiffs to produce the crew members' personnel files (containing the releases) noticed by the defendants. The only reason that the District Court did not order plaintiffs to produce the personnel files was because plaintiffs misrepresented that all requested documents had been produced.

d. This Court in *Kupferman* found that Ross, in accordance with the highest standards of professional conduct, should have sought counsel from the judge to ascertain his duty regarding disclosing the release.

The Code of Professional Responsibility, DR7-102(A)(3) dictates that a lawyer in his representation of a client shall not "conceal or knowingly fail to disclose that which he is required by law to reveal" and under DR7-102(A)(5) a lawyer shall not "knowingly make a false statement of law or fact" and under DR7-102(A)(7) a lawyer shall

not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

The facts of this case now before this Court show conclusively that plaintiffs and/or their attorneys knowingly and fraudulently

a) entered into an illegal agreement;

b) knowingly failed to reveal the existence of the releases contrary to the law; and

c) knowingly made false statements of fact.

The conduct of plaintiffs and their attorneys throughout this litigation was and is precisely that type and degree of fraud on the Court that Rule 60(b)(3) contemplates and as such the District Court properly dismissed, *sua sponte,* the plaintiffs' complaints.

VI. Response to IAI Point II

Judge Carter dismissed the complaints in this action not only on the basis of Rule 60 of the Federal Rules of Civil Procedure but also on the basis of Rule 37. In the opinion of October 26 the District Court found that discovery was deliberately frustrated (A17).

After stating that ordinarily sanctions under Rule 37 are not appropriate absent a court order the Court continues by saying that the facts of this case warrant extreme measures (A12).

The objection is made to the District Court's decision under Rule 37 by IAI only and the brief on behalf of the individuals Landau, Muscatel and Koren does not address itself to Rule 37.

Deliberate frustration of discovery began with the production of the written questions and answers of the individual plaintiffs. Plaintiff would have us believe these documents are an indication of a commitment to full discovery (IAI Brief p. 28).

As can be seen the answers are false for the simple reason that the money paid each individual was paid as consideration for a release. The effect of these payments under Israeli Law necessarily includes the effect of a release under Israeli Law. The release is not mentioned and the payments are said to have no effect under Israeli Law. This, based upon the opinion of plaintiff's expert, is far from the truth and definitely misleading.

In October 1974 defendants moved for a dismissal of the complaints under Rule 37(d) (101a) based on the failure of plaintiffs to comply with discovery notices. On the affidavits of Mr. Turner and Mr. Schierberl stating that the defendants were merely harrassing the plaintiffs and that all discovery had been complied with, the court, on the parties' affidavits, denied the motion without opinion on November 19, 1974 (118a, 111a).

The defendants 37(d) motion went not only to the failure to produce documents but also to the failure to answer interrogatories. Interrogatory 58 or 59[1] if answered fully would have revealed the releases. They were never answered despite the assurance in plaintiffs' affidavit (132a-133a) that they were being prepared.

Plaintiff has no call to attack Judge Carter for acting without a court order when plaintiffs' misconduct defeated the motion for a court order.

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[1] 59 Defendant's interrogatories (R35): "If you, or anyone on your behalf, has ever made any written reports, applications, claims or statements with reference to how the accident happened or as to your injuries, or with reference to your claim for reimbursement of expenses incurred or other benefits, please state:

(a) The person, firm, corporation, insurance agency, insurance company, employer, governmental or public agency, or law enforcement agency to whom such report, statement, claim, or application was made, and their addresses.

(b) The date of each such report, statement, claim, or application; and, without disclosing the content thereof, state generally the type of report and the general nature of it.

(c) The name and address of the present custodian of such report, application, claim or statement, or of any copy thereof."

In reviewing the failure of defendants to fulfill an agreement to provide written answers to questions not answered during a deposition of a defense witness the 5th Circuit in *B.F. Goodrich Tire Company* v. *Lyster,* 328 F.2d 411 (5th Cir. 1963), said:

> "In terms, Rule 37 supports defendants position. We prefer, however, to avoid the uncertain footing a tight construction of Rule 37 affords. We place our decision on the broader, firmer ground that in the circumstances of this case it was an abuse of judicial discretion for the trial court to exclude the deposition."

The facts leading to the discovery problem as well as the technical terms of the rule have to be examined to determine the appropriateness of the court's actions under Rule 37. Where there has been a pattern of abuse of the federal rules sanctions may be imposed under Rule 37. *Vac Air Inc.* v. *John Mohr & Sons, Inc.,* 53 FRD 319 (DC Wis. 1971).

Furthermore, while the purpose of requiring a Rule 37 order may be to give the defaulting or refusing party a second chance, the fact is that plaintiffs had several chances to produce the personnel files, of which the application for the Rule 37 order was the fourth.

Plaintiffs' failure to produce the releases was a complete failure to respond to discovery and certainly the falsehood contained in the plaintiffs' successful blocking of the defendant's 37(d) motion is sufficient to demonstrate a complete disregard for the rules so as to justify the invocation of Rule 37(d), thus abrogating the need for a court order prior to the imposition of sanctions.

IAI cites a number of cases including *Fox* v. *Studebacker-Worthington Inc.,* 516 F2d 989 (8th Cir. 1975) to the point that a court order must precede sanctions under Rule 37(b). In those cases however the party in discovery default had at least attempted to comply with the discovery.

A further argument of counsel for IAI is based on the premise that the court below was wrong in imposing sanctions under Rule 37 in that the failure to produce the releases was due to some misunderstanding between IAI and plaintiffs' counsel. When a deliberate act is perpetrated by counsel such as providing false information and withholding information, the client suffers is not without remedy.

The firm of Condon & Forsyth is the attorney of record at this time for all plaintiffs in the District Court. There has never been a substitution. Fuchsberg & Fuchsberg style themselves the trial counsel of the individual plaintiffs in their Appellate Brief (page 17, Point III). When the notice to produce and defendants interrogatories were served they were served on counsel for all plaintiffs Condon & Forsyth. The actions of the attorney chosen by the plaintiffs are the actions of all the plaintiffs. *Link* v. *Wabash Railroad Co.*, 370 US 626, 82 S.Ct. 1386, 8 LEd 2d 734 (1962).

The Court below addressed the issue of attorney client misunderstanding as follows:

> "IAI's lame excuse that its attorney in New York did not understand the meaning of instructions drawn by its attorneys in Israel cannot justify its failure to disclose the releases as affirmative defense to SP's counterclaim." (A11).

Further the court noted the incredibility of plaintiff's position that IAI knew of the release but not the significance and Condon and Forsyth knew the significance but not of the release (A16)

The failure on the part of plaintiffs to provide the releases, the misleading information provided by plaintiffs and the method of the plaintiffs in inhibiting and frustrating discovery were sufficient in Judge Carter's view to impose sanctions. In reviewing this decision the Judge's

exercise of discretion is supported by the record and his decision should be upheld as correct in light of the judicial motives behind the sanctions available under Rule 37. *National Hockey League et al.* v. *Metropolitan Hockey Club,* —— US ——, 96 S.Ct. 2778, —— LEd 2d —— (1976).

The complaint that IAI now makes that they were not fully heard, "by fully documented evidence or a hearing" is absurd as the post-trial motions certainly provided each party the right to be heard.

In its opinion of January 4, 1977, the lower court discusses this court's opinion in *Flaks* v. *Koegel,* 504 F2d 702 (2nd Cir. 1974) and its application to the instant case. Also distinguished factually from the instant case is *Universal Oil Products Co.* v. *Root Refining Co.,* 328 US 575, 66 S.Ct. 1176 (1946).

Universal (supra) and *Flaks* (supra) are cases in which the adversary presented the evidence to the court. In *Universal* (supra) the Supreme Court after indicating that the judgment would not be nullified without a hearing,

> ". . . where petitioner throughout objected to the character of the investigation if it was to be used as a basis for adjudicating rights." (66 S.Ct. at 1179).

There is then no absolute rule that a hearing must be had in the instant case. Appellants have had ample opportunity to be heard by full documentation and they have no cause to complain as the lower court stated in its January 4, 1977 opinion (A23).

Although there is a need for caution in imposing sanctions under Rule 37 a trial court cannot not impose sanctions when it deems them necessary. *Diaz* v. *Southern Drilling Corp.,* 427 F2d 1118 (CA 5th 1970), cert. denied 400 US 878, 91 S.Ct. 118, 27 LEd 2d 115.

Judge Carter is further supported in determining that no hearing was necessary in his January 4, 1977 opinion by the Case of *Link* v. *Wabash Railroad Co.*, 370 US 626, 82 S.Ct. 1386, 8 LEd 2d 734 (1962).

In *Link* (supra) after much previous travail the district court dismissed the complaint *sua sponte* when plaintiff's attorney failed to give a reasonable explanation for not appearing at a pre-trial conference. The dismissal was premised under Rule 41 b Federal Rules of Civil Procedure but stands for the scope of a district court's power to protect itself and the Federal Rules from abuse. In the instant case the points that were basic to the courts October 26, 1976 decision were fully before all parties.

The United States Supreme Court reviewed a District Court judge's ability to act under Rule 37 in *National Hockey League, et al.* v. *Metropolitan Hockey Club*, —— US ——, 96 S.Ct. 2778, —— LEd 2d —— (1976).

> "Under the circumstances of this case we hold that the district judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondent's 'flagrant bad faith' and their counsel's callous disregard" of their responsibilities. Therefore, the petition for a writ of certiorari is granted and the judgment of the Court of Appeals is reversed."

And on the philosophy behind backing the District Court the Supreme Court says at 2780:

> "But here as in other areas of the law, the most severe in the spectrum of sanctions provided by the statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Application of the principles set out in the above decision sustains Judge Carter in his decision.

VII. Response to IAI Argument, Point III

IAI's argument that the District Court refused to determine the "materiality of any alleged misconduct" is difficult to understand in view of the statement by the District Court that:

> "There can be no doubt in this case, however, plaintiffs knowingly and fraudulently withheld from defendants, the court and the jury, matters *material* to the fair disposition of claims presented in ths lawsuit which were known by no one but themselves." (A14-A15). (Emphasis added)

Furthermore, IAI itself has contended that the releases will resolve either 100% or 65% of the crew member's claims. (469a). To now insist that a Court must determine whether concealing those releases had any material impact on the lawsuit is the type of question this court deemed to be frivolous in one of the cases cited by IAI. *Flaks* v. *Koegel,* 504 F.2d 702, 710 (2d Cir. 1974).

VIII. Response to IAI Argument, Point IV

In this point, IAI attempts to separate the actions which it was instrumental in bringing together. The matter becomes clear, says IAI, by separating the hull claim from the bodily injury claim. The claim could have been brought that way but IAI chose otherwise. According to the testimony of IAI's General Counsel, IAI "cooperated" with its hull insurers' suggestion that the crew members be joined and indeed IAI, in addition to joining in that solicitation, agreed to finance the crew members' New York suit in return for an interest in it. Now says IAI they should

be considered as separate. Why? All plaintiffs joined in an illegal scheme to sue SP for their hoped for joint profit, concealed evidence material to a proper resolution of that litigation, had the same attorneys of record in the District Court, cooperated at the trial and now when their scheme is at least partially revealed, IAI suggests that only the crew members' claims are affected.

In fact, the District Court would have been justified in dismissing IAI's hull suit even if the crew members had never settled with IAI and the releases never existed. The 1972 agreement by which the IAI interests solicited and agreed to finance the crew members' litigation is by itself enough to warrant dismissal of IAI's hull claim for it was in violation of a penal statute and the common law of this state. A Court cannot be a party to any part of the enforcement of an illegal agreement. Note that the District Court, in a comment pregnant with significance, observed that IAI could not object if the Hermann affidavit was used against it. (A8 n3). The Hermann affidavit is of course the one that revealed the terms of the 1972 agreement.

It is conceded by IAI (IAI brief p.10) that defendants' Notice of Production (58a) was never transmitted to IAI. It has also been conceded (albeit reluctantly and at the eleventh hour) that the releases were contained in the files called for in that notice. The notice, however, called for many other documents relating to the facts of the accident and if the notice was never sent to IAI it is fair to conclude that no attempt was made by IAI after July 1973 to search out items responsive to the other demands of the Notice.

IAI's failure to produce goes beyond its failure to produce the releases and its attempt to so restrict its failure should be rejected. It is known that IAI failed to produce the 1972 agreement and that after July 1973 they never looked for any documents responding to any portion of defendants notice.

IX. Response to Crew Members' Argument, Point I

In this point the crew members appear to argue that they can recover more than 100% of their damages if they can successfully conceal a prior settlement from the current defendant. That cannot be the law and even in the absence of inquiry by defendant, a plaintiff has an obligation to reveal that he had received payment, and the terms under which it was received. The law does not permit a double satisfaction for a single injury, *Milks* v. *McIver,* 264 N.Y. 267, 190 N.E. 487 (1934) and *Derby* v. *Prewitt,* 12 N.Y. 2d 100, 236 N.Y.S. 2d 953 (1962).

In *Derby* v. *Prewitt,* supra, plaintiff was struck by a taxicab and taken to the hospital where she was treated by Dr. Prewitt. She subsequently settled her claim against the cab driver for $8,000, executed a release in his favor and thereafter brought suit against the doctor for $75,000. The Court observed that:

> "The question for resolution, and it is to be decided as an issue of fact upon a trial, is whether the plaintiff's settlement with the taxicab driver did actually constitute satisfaction of all damages caused by his wrong, or was intended as such. If it did, or was so intended, no claim remained against the doctor. But if it did not reflect full satisfaction and was not so regarded—and the burden of proving this essential fact rests upon the plaintiff—the release will not prevent recovery against the doctor."

While this rule was changed in 1971 by the enactment of CPLR 4533(b) (McKinney Consolidated Laws, Book 7B) to the extent of making the question one for the Court when the prior settlement was being offered in mitigation of damages, it remains otherwise the same. Had the releases been revealed, defendants could have moved for summary judgment and the result would have been a dismissal of the crew members' claims at that time. In addi-

tion, according to CPLR 4533(b), the evidence of the settlement is to be heard in the absence of the jury only when offered in mitigation of damages. When offered for any other purpose, such as to establish bias or to attack credibility, the jury may hear the evidence. (CPLR 4533(b), 1975 Supplementary Practice Commentary by Joseph M. McLaughlin). For example, the crew members could have been asked the grounds of their claims against IAI and IAI could have been asked its reasons for making the settlements. The jury could well have been persuaded by these arguments that IAI was solely responsible for the accident and the trial would have ended much earlier than it did—particularly since the issues of damages were bifurcated.

Had the releases been revealed, they would have led to the additional agreement entered into in 1972 among plaintiffs and on that basis, defendants could have moved to dismiss all claims of all plaintiffs on the ground of illegality and if granted, the entire trial would have been avoided.

X. Response to Crew Members' Argument, Point II

The crew member's argument on this point is difficult to follow. As is discussed elsewhere in this brief, there is no question that the deposition answers and the crew members' responses to the questionnaire were misleading. Indeed, Mr. Schierberl who represented these crew members and is still attorney of record for them in the District Court admits that the same testimony and answers confused him. When the crew members argue that the defendants should have discovered the releases and the 1972 agreement, they are *a fortiori* arguing that their own counsel should have discovered the existence of those documents, whereas in fact, Mr. Cousins' position is that there was no reason for him to make any such inquiry. Mr. Schierberl was as misled as counsel for defendants, and

the crew members themselves, at least according to their attorneys, never told anyone about either agreement.

The crew members in this point interpret FRCP 34 as requiring that a request for production of documents identify the document by name. This is obviously not the law and in any event, defendants did identify what they wanted, i.e. personnel files.

Returning to the opening paragraph of this point in the crew members' brief (p. 10), it is true that the rules do not require a party to tell his adversary "what questions to ask, what interrogatories to propound, or what documents to seek . . . or what legal research to undertake". The rules do require candor in responding to the discovery that is requested and that was not done here.

The crew members' brief (p. 11) makes the astounding statement that "First of all, neither Mr. Muscatel nor his attorney made any attempt to characterize the payments" [as Workmen's Compensation]. Both have so characterized the payments and indeed reasserted that position as recently as November 5, 1976.

In his affidavit of November 5, 1976 submitted in support of the crew members' application for reargument, Mr. Cousins asserted that at a meeting before Muscatel's deposition "Mr. Schierberl explained that the monies received by the crew members were liens which would have to be repaid out of the proceeds recovered in settlement of this action. That was clearly the understanding of the crew members insofar as they expressed it to me. . . ." (255a)

Mr. Cousins then goes on to state in the next paragraph of his affidavit that Mr. Muscatel's deposition testimony "was completely in accordance with what Mr. Schierberl explained during the pre-deposition meetings . . ." (255a)

In the next point in their brief, the crew members equate their position in this case with that in New York Workmen's Compensation cases and coyly ask, "Has the Court below never heard of Workmen's Compensation?" (Crew members' brief, p. 19)

Finally, in a still more blatant example, it will not have escaped the Court's notice that the crew members first claimed issue on this appeal asks:

> "WERE THE PLAINTIFF CREW MEMBERS REQUIRED TO PLEAD EITHER RELEASE OR WORKMEN'S COMPENSATION AS A PART OF THEIR COMPLAINT." (Crew Members' brief, p. 7)

Mr. Cousins goes on to state that "Our firm understood that Israel Aircraft had a Compensation-type lien which we would honor. That is what the crew members understood and that is what the defendants understood." (257a)

On page 5 of the same affidavit, Mr. Cousins relates that he was present on July 16, 1974 with his clients when "we had actually inquired if there were any Workmen's Compensation liens and we were told by the crew members both of the existence of the liens and their amounts . . .
* * *

" . . . we noted the existence of the liens on our files accordingly; . . ." (252a-253a)

Each of the crew members submitted an affidavit on the motion for reargument. Each of those affidavits reads as follows (Landau affidavit, 269a; Muscatel affidavit, 273a-274a; Koren affidavit, 276a-277a).

> "The explanations and representations made to me by Israel Aircraft Industries and its attorneys were to the effect that the deed I signed referred to and

acknowledged only the settlement of my *compensation claim* against my employer'' (Emphasis added)

Thus not only did Mr. Cousins and his clients characterize the payments as being in the nature of Workmen's Compensation but Mr. Cousins' file is so noted!

XI. Response to Crew Members' Argument, Point IV

The crew members are not being punished for any error or omission of their employer. There was quite enough misconduct on their own account to warrant the action taken by the District Court. When a litigant enters into an illegal agreement and commences litigation in furtherance of its aims, conceals documents material to his cause of action, and engages generally in a pattern of deception, he can hardly be heard to complain when a court reacts strongly to those revelations. This is not a case where the evidence against the crew members and IAI is contested; they supplied in toto the evidence that justifies a dismissal of the complaint.

XII. Summary

It has been necessary to burden the Court with a detailed demonstration of numerous inconsistencies in plaintiffs' positions throughout the course of the litigation. The ones pointed out are not the only instances but defendants believe the point has been sufficiently shown.

Based solely on information supplied by plaintiffs, the record clearly shows an illegal agreement to bring litigation which was improperly conceived and improperly conducted. In pursuit of the aims of the illegal agreement, documents were concealed, false assurances given, false affidavits filed and the status of the litigants misrepresented. It was only when the jury made awards that re-

sulted in a considerable exposure to IAI that the unified facade of plaintiffs' position began to crack. The crew members who received very high awards refused to give up 65% to their former ally who then proceeded to reveal at least some details of the arrangement successfully concealed for four years.

Sufficient was revealed to allow the District Court to see through the scheme and to act in the only way possible to protect the Court from dishonor.

This, then, caused a further temporary division in the IAI camp and what was revealed confirmed that the District Court had been correct and that its actions were fully justified to protect the judicial system and as a sanction against those who would use that system with disdain for its traditions.

XIII. Conclusion

The decision of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Defendants-Appellees

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DENNIS C. MURPHY
JAMES P. DONOVAN
Of Counsel

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 72 C 5359

ISRAEL AIRCRAFT INDUSTRIES, LTD., et al.

Plaintiff

against

STANDARD PRECISION, et al.

Defendant

Attorney's
AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at One Glenwood Avenue Yonkers, New York

That on April 18, *1977* *deponent served the annexed* Appellee's Brief.

on William L. Schierberl, Esq. Condon & Forsyth, Esqs. and Norman L. Cousins, *attorney(s) for* plaintiffs Fuchsberg & Fuchsberg

in this action at 1251 Avenue of the Americas, N.Y., N.Y., 250 Broadway, N.Y., N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

John V. Disposito

JOHN V. DISPOSITO
Notary Public, State of New York
No. 30-0888450
Qualified in Nassau County
Commission Expires March 30, 1979

Dennis C. Murphy

The name signed must be printed beneath

Dennis C. Murphy